

87-620

Supreme Court, U.S.  
FILED

SEP 2 1987

JOSEPH F. SPANIOL, JR.  
CLERK

NO.

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IN THE SUPREME COURT  
OF THE UNITED STATES

(October Term 1987)

\*

BARRY KRUPKIN, ET AL.,  
Petitioners,

v.

DOW CHEMICAL CO., ET AL.,  
Respondents.

IN RE "AGENT ORANGE"  
PRODUCT LIABILITY LITIGATION

\*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

(Re: Certification of Class  
and Class Settlement)

\*

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## QUESTIONS PRESENTED FOR REVIEW

### I.

There is a critical and long overdue need - and this is the appropriate case in which to do so - to resolve the abundant conflicts among the circuit courts and decide the nationally important issue of the feasibility of Rule 23 class actions in mass accident and chemical exposure cases involving serious personal injuries and deaths, the procedures that should be followed with regard to the settlement of such cases and the proper criteria which should be utilized in determining whether proposed settlements in such cases are fair, adequate and reasonable.

### II.

Whether the district court erred in certifying this case as a Rule 23(b)(3) class over all issues except punitive damages and as a Rule 23(b)(1)

(B) mandatory class with respect to punitive damages.

### III.

Assuming *arguendo* that the class action certification was appropriate, whether - in view of the evidence of conflicts of interest; extreme judicial pressure; absence of knowledge about important matters such as the kinds and numbers of claims; absence of participation in the negotiations by the class representatives, veterans leaders and regional counsel; and the overall posture of the case - the settlement in this case was properly negotiated.

### IV.

Whether - in view of the paucity of information concerning the kinds and numbers of claims; the absence of a distribution plan or estimate of fees; the timing of the cut-off date for

opting out; and the general posture of the case - the due process rights of the absent class members were violated and/or the district court erred by its failure, before sending out the settlement notices, to conduct a pre-notification process and hearing and to conduct a claims process as part of that procedure; to decide on the distribution plan and probable fees; and to include in the notice of the fairness hearings the kinds and numbers of claims, a summary of the distribution plan, the amount of fees and the options available to the class members, including the right to opt-out of the settlement and class.

#### V.

Whether - in view of the vigorous opposition of the great majority of the members of the class, including one of the representative plaintiffs and one of

the lead counsel; the fact that there are at least 248,000 claims, of which 128,000 involve serious injuries and deaths, thus making the \$180 million settlement grossly "inadequate" on its face; that the plaintiffs had at least a *prima facie* case on all issues, including causation and the military contractor defense, thus making the settlement "unreasonable" on its face; that the distribution plan totally disfranchised large subgroups of the class, such as independent claims of wives and children and the veterans who suffered serious injury but were not totally disabled; and that the distribution plan was based on non-tort principles, wholly alien to those underlying the lawsuit and the settlement made by the parties - the district court erred in approving the settlement in this case.

## PARTIES BELOW

By various estimates, there are over two-hundred and seventy thousand (270,000) members of the class as ultimately certified by the district court below. Of those, it is impossible to determine and include a list of the class members who object to the class certification and settlement.

Only Barry Krupkin has been chosen as the named party since he is typical of those class members who object to the class certification and settlement.

The respondents are: Dow Chemical Company; Thompson Chemical Company; Diamond Shamrock Company; Monsanto Company; T & H Agriculture and Nutrition Company; Hercules Company; and Uniroyal Company.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

The petitioners, members of the Agent Orange class who object to the class action certification and settlement, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 21, 1987.

OPINIONS BELOW

1. The order and opinion of the district court, dated December 16, 1983, certifying a Rule 23(b)(3) class action on all claims except for punitive damages and a Rule 23(b)(1)(B) mandatory class on punitive damages. In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (EDNY 1983) (See Vol. I, p. 456a of Single Appendix filed in connection with Petition for Writ of Certiorari submitted by Wayne Michael

Mansulla in *Vincent C. Lombardi, et. al., vs. Dow Chemical Co. et al.*; said Single Appendix shall hereafter be referred to as the "Lombardi Appendix").<sup>A-1</sup>

2. The order of the district court dispatching notice of the proposed settlement and schedule of fairness hearings dated September 25, 1984. 597 F.Supp. 740, 866-876 (E.D.N.Y.1984). (Vol. I, p. 409a-430a, Lombardi Appendix).

3. The order and opinion of the district court approving the settlement dated September 25, 1984. 597 F.Supp. 740 (E.D.N.Y. 1984) (Vol. I, p. 135a of Lombardi Appendix).

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A-1. Mr. Mansulla has expressly authorized the Petitioners in this Petition to cite and utilize the Single Appendix he has filed in *Lombardi*. Some of the relevant decisions are not contained in the *Lombardi* Appendix. Those are included in the separate Appendix to this Petition.

4. The order and opinion of the district court establishing a plan of distribution for the settlement fund, and final judgment, dated May 28, 1985. 611 F.Supp. 1396 (E.D.N.Y. 1985) (Appendix I to this Petition).

5. The opinion and judgment of the Court of Appeals affirming the certification of the class, the settlement notice and procedures and the settlement. In Re "Agent Orange" Product Liability Litigation, MDL No. 381, 818 F.2d 145 (2 Cir. 1987). (Vol. II, p. 676a of Lombardi Appendix).

6. The opinion and judgment of the Court of Appeals affirming the distribution plan in part and reversing in part. 813 F.2d 179. (Appendix II to this Petition).

7. The Order of the Court of Appeals overruling Plaintiffs' Motion for Rehearing. (Vol. II, p. 777a of Lombardi Appendix).

## JURISDICTION

The final judgment of the Court of Appeals was entered on April 21, 1987. A petition for rehearing and rehearing en banc was timely filed and it was overruled on June 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of Rule 23 F.R.C.P., the class action rule. It also involves the 5th and 14th Amendments to the U.S. Constitution (due process clauses).

## STATEMENT OF THE CASE

Veterans who served in Vietnam during the Vietnam War and their families filed a class action suit against seven chemical companies alleging that they formulated, manufactured and sold to the U. S. Government a

herbicide called Agent Orange and that the servicepersons suffered serious injuries or deaths, their wives suffered miscarriages and their children birth defects as a result of the servicepersons' exposure to the Agent Orange in Vietnam. The herbicide was used to defoliate the jungle and destroy the enemy's food crops. The plaintiffs' cause of action was based upon simple and gross negligence, product defects and intentional torts. Agent Orange is a combination of two products the chemical companies had, for some time previously, been selling domestically as herbicides, namely dichlorophenoxyacetic acid (2,4-D) and trichlorophenoxyacetic acid (2,4,5-T). As a part of the manufacturing of 2,4,5-T, a contaminant is created. It is called tetrachlorodibenzo-para-dioxin or 2,3,7,8-TCDD ("dioxin"). Dioxin is one of the most toxic compounds known to man and is at the

heart of the Agent Orange litigation. Plaintiffs alleged that exposure<sup>1</sup> to dioxin causes cancers, liver diseases, neurological problems, chloracne and other skin problems, birth defects in the exposed person's children, and other serious maladies.

1. Initial Rulings On Military Contractor Defense. Early on, Judge Pratt, the initial judge in the district court, established three elements for the military contractor defense, 506 F.Supp. 762 (EDNY1980);<sup>2</sup> stated he would con-

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1. In testimony before the Subcommittee on Oversight and Investigation on November 19, 1982, the EPA took the position that there is no safe level of exposure to dioxin. EPA has concluded: "In sum, the data on toxic effects in animals and humans together with the data on exposure potential establish that the continued use of 2,4,5-T and silvex contaminated with TCDD (dioxin) pose risks of adverse affects on human health". Doc. 5400, Exhibit 4, JA 13434.

2. Element One is that "the government established the specifications for the product" and element two is that the chemical companies manufactured the product in conformity with those specifica-

duct serial trials; and hold the initial trial on that issue only.*Id.* Thereafter, five of the seven chemical company defendants filed motions for summary judgment on on the basis of the military contractor defense; three (Dow, T & H, and Uniroyal) were granted partial summary judgments on elements one and two, but denied complete summary judgments because of the existence of fact issues on element three; and Hercules and Thompson Chemical were granted complete summary judgments. (Monsanto and Diamond Shamrock are the two that did not file such motions.)<sup>3</sup>

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tions. Element three is that the Government knew as much about the hazards of the product as the manufacturer.

3. It may not be just coincidental that Monsanto and Diamond Shamrock had the highest amounts of dioxin in their products. See *Agent Orange on Trial, Mass Toxic Disasters in the Courts*, Peter H. Schuck, The Belknap Press of Harvard University Press, 1986 (hereafter "Schuck"), at 141.

## 2. Judge Weinstein takes over case.

In September of 1983, Judge Pratt, having been appointed to the Second Circuit, transferred the case to Judge Weinstein and its posture changed dramatically. Judge Weinstein immediately reinstated Thompson Chemical and Hercules as defendants and the United States Government as a third-party defendant;\* and ordered that, instead of the serial trials that Judge Pratt had planned, he would try approximately ten test cases on *all* issues, including liability, causation, actual damages and punitive damages. See Schuck pp. 111-117. He set the test cases for trial on the merits for May 7, 1984. Up to September 1983, because the only trial scheduled had been on the military

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4. The chemical companies had sued the U.S. as a third-party defendant for indemnity and Judge Pratt had granted the U.S. an interlocutory default judgment, on the basis of the *Feres* doctrine. 506 F.Supp. 762 (1980).

contractor defense, not involving medical causation in any way, no clinical or epidemiological studies<sup>5</sup> were undertaken by plaintiffs and after September, 1983, time pressures forced the plaintiffs to concentrate their medical causation efforts solely upon the ten cases going to trial. Judge Weinstein also certified a Rule 23(b)(3) class action as to all issues except punitive damages and a Rule 23(b)(1)(B) mandatory class with regard to punitive damages. 100 FRD 713, 724.\* He further

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5. The costs of undertaking clinical studies on each plaintiff was so substantial that it made no sense to commence such studies until they became necessary for trial. The cost of an epidemiological study was prohibitive - over \$20 million. As discussed, *infra*, Judge Weinstein's narrow causation doctrine (requiring epidemiological studies) would thus "price out" toxic tort plaintiffs.

6. Judge Weinstein defined the plaintiff class as: "Those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or

required the issuance of notice<sup>7</sup> which provided for a cut-off date of May 1, 1984 for opting-out of the Rule 23(b)(3) class.

3. Motions concerning military contractor defense. Extremely pertinent to the discussion, *infra*, of the military contractor defense is the fact that before the May 7, 1984 trial, plaintiffs filed a motion to reconsider Judge Pratt's previous partial summary

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other phenoxy herbicides, including those composed in whole or in part of 2,4,5-T, trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure." *Id.* at 729.

7. The adequacy of notice to the class and questions touching upon subject matter and in personam jurisdiction are not addressed in this Petition. They are addressed, however, in a Petition being filed by Wayne Mansulla and Prof. Sherman Cohen. See Petition for Certiorari styled *Pinkney v. Dow*.

judgment on elements one and two of that defense. Doc. 862, J.A., mentioned at 597 F.Supp. 843, 847-8. See excerpts of such motion in Appendix III. The motion, based on deposition testimony and documents, demonstrated clearly that fact issues existed with respect to those two elements; that Agent Orange was the combination of two off-the-shelf products previously formulated, manufactured and sold domestically; that the specifications approved by the Government did not mention or authorize the presence of dioxin; and since it was undisputed that such deadly contaminant was present in *all* Agent Orange, the chemical companies did not, therefore, manufacture Agent Orange in conformity with the specifications.® Judge

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8. Undersigned counsel, who took over the handling of the military contractor defense issue from Yannacone & Assoc. in October of 1983, filed a number of other motions concerning that issue, including a motion to allow VIP witnesses (persons high up in the Kennedy, Johnson and Nixon

Weinstein agreed to permit the introduction of evidence on elements one and two at the trial of the case. See Excerpts of Trans. of Hearing, Mar. 19, 1984, included in Appendix III.

4. Agent Orange Plaintiffs Management Committee ("AOPMC") fee-sharing agreement. When Yannacone & Associates resigned in September of 1983 as class counsel, the court appointed the undersigned counsel and two others to form a new AOPMC. In order to secure the monies required to finance the litigation, it became necessary to give six of the nine members of the new AOPMC, who were providing the general monthly operating funds for the litigation, a three-to-one return on their money. The agreement to

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Administrations), who had not yet been deposed, to testify that, as persons who participated in the decision-making process, they had no knowledge of dioxin or that Agent Orange could be hazardous to human health.

do this significantly influenced the settlement negotiations. See discussion, *infra*. Judge Weinstein, though critical of the agreement, refused to order it rescinded. 611 F.Supp. 1452.

5. Tentative settlement agreement reached May 7, 1984. Judge Weinstein, just after the opt-out period had expired, and on the weekend just before trial was to begin, ordered all counsel to "bring their toothbrushes" and appear before him and three special masters (appointed to assist in settlement discussions) for the purpose of conducting round-the-clock settlement negotiations. Doc. 5600, J.A.; Schuck at p. 150. In the early morning hours of May 7, the day the ten test cases were going to trial, a tentative settlement was reached between the AOPMC and the seven chemical company defendants. The tentative agreement was simple - it provided for the immediate payment of

\$180 million lump sum for all claims, including those of non-totally disabled veterans and the independent claims of wives and children. See 597 F.Supp. at 862-866. This was not a settlement negotiated by the parties - it was an agreement forged by Judge Weinstein's aggressive, take-it-or-leave-it attitude, under a trying and highly unfavorable negotiating environment, and in an almost total vacuum of knowledge about the kinds and numbers of claims.

The undersigned counsel, then a member of the AOPMC, filed a sworn, question-and-answer affidavit which was never contradicted by any member of the AOPMC or anyone else. Doc. 5600, JA 14792. Moreover, after exhaustive research and interviews, including conversations with other members of the AOPMC, Prof. Schuck corroborated the essential contents of such affidavit. *Schuck*, pp. 143-166. See also Manes/

Ellison Affidavits, J. A. 17256  
Yannacone Depo. Affidavit, Doc. 5522,  
J.A. 14458-60; and Doc. 5121. As Prof.  
Schuck observed "[f]rom the moment  
Weinstein entered the Agent Orange case,  
the goal of settlement was uppermost in  
his mind" because "he believed that a  
mass toxic tort ... case like Agent  
Orange should not be litigated". id. p.  
143.

Judge Weinstein selected \$180<sup>million</sup> as the  
settlement figure and in effect told the  
parties that the case *would be settled  
for that amount.* id. Doc. 5600; Schuck,  
p. 159. Indeed, even though Special  
Master Shapiro reported to Judge  
Weinstein that he could get the chemical  
companies to pay \$200 million, "the  
judge adamantly refused", stating that  
\$180 million was the amount the case  
would be settled for because "he did not  
want the settlement amount to . . .  
(encourage) groundless mass toxic tort

litigation in the future." Schuck at 159, 163.<sup>8A</sup> Judge Weinstein excluded the class representatives, referring counsel and veterans organization officials from the negotiations completely and all but two of the ADPMC until the last weekend of the negotiations. id., Doc. 5600.

The combination of time pressure and weariness impaired the ability of the ADPMC to withstand Judge Weinstein's intensive push. id. Doc. 5600. The last day of the negotiations, as the ADPMC resisted, Judge Weinstein not-so-vaguely threatened to change rulings he had previously made which were favorable to plaintiffs and to hold the ADPMC

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8A. The intent of Judge Weinstein to chill toxic tort litigation was further manifested during the negotiations by his agreeing with the defendants that the settlement agreement should state that "causation had not been proved" and to consider low fees to class counsel "in order to discourage such (toxic tort) suits in the future." Schuck at 154, 164.

"personally responsible" should they not agree to the \$180 million." *id.* Doc. 5600; Schuck at 163. He also used the carrot as well as the stick; he strongly implied that, if the settlement were accepted, plaintiffs would have their day in Court against the Government,<sup>10</sup> the wives and children would

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9. One member of the AOPMC, O'Quinn, who finally changed his vote to approve the settlement, stated he changed his vote primarily because he construed this statement to mean that the members of the AOPMC would personally have to pay the \$180 million if they refused the settlement and lost the case. Doc. 5600, *Schuck, id.* at 163.

10. Judge Weinstein had suggested that plaintiffs expressly retain, in the settlement agreement, the right to pursue the Government, which the plaintiffs did. Doc. 2750. He implied that he would stand by the rationale expressed in his opinion bringing the Government back into the litigation with respect to the chemical companies' third-party complaint. See 580 F.Supp. 1242. As stated, the AOPMC relied upon the action against the Government as another possible source of damages for the class. See Doc. 5600, JA 14882-14885; Doc. 2897, JA 6685-6703.

be compensated and the funds would be distributed on a tort concept (cause and effect) basis. *id.* Doc. 5600. <sup>10A</sup> In addition to all the foregoing, Judge Weinstein took advantage of the knowledge vacuum about the numbers and kinds of claims; the AOPMC accepted Stanley Chesley's estimate that there were only 20,000 claims, of which only 3,000 were serious in nature. *id.* Doc. 5600; Schuck at p. 162. <sup>10B</sup>

With the six members of the AOPMC who were receiving the three-to-one return on their monetary advances all voting in the affirmative, the AOPMC finally agreed to Judge Weinstein's \$180 million

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10A. As discussed, *infra*, none of these implied commitments were fulfilled.

10B. The estimate of Mr. Chesley, one of the financial members of the AOPMC, was grossly incorrect; a claims process completed in May of 1985 established the total number of claims at 248,000, with 128,000 serious in nature (cancers, deaths, birth defects, etc.). Doc. 60460, J.A. 15519; 611 F.Supp. at 1417.

settlement figure. id. Doc. 5600. Schuck at pp. 162-165. Not a single one of the ADPMC agreed to the settlement because he thought plaintiffs could not win the scheduled jury trial - they *all* thought that the plaintiffs would establish a strong *prima facie* case on all issues.<sup>11</sup> Prof. Schuck sensed what really happened with regard to the negotiations in this case:

In such a situation, the dangers of judicial overreaching and intimidation in quest of settlement are no less real for being subtle. A well-meaning, but overzealous judge may occasionally go too far

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11. See undersigned counsel's statement in Doc. 5600; David Dean's statement at the first fairness hearing, Doc. 3565, p. 10 ("... the defendants acts were so egregious and the plight of the innocent veterans so evident ... that I believe we would have won"); Tom Henderson's statement that "I believe the case would have been won in the most conservative jurisdiction in the United States, let alone before a Brooklyn jury", N.Y. Times, May 8, 1984; and the statement of Gene Locks that plaintiffs would have won. Doc. 4389, p. 409, JA 11105.

and "coerce" settlement, and Weinstein himself has been accused of this. (Citing *Kothe v. Smith*, 771 F.2d 667 (2 Cir. 1985) and the *Almanac of Federal Judiciary* (Chicago: Law Letters, Winter 1984), at 57).

Schuck at p. 163.

6. Post-settlement events. Soon after the tentative settlement agreement was reached, the undersigned counsel requested Judge Weinstein, through the Special Master, to in effect conduct a pre-notification process and hearing, including a claims process and adopt a distribution plan *before* conducting the fairness hearings or deciding whether to approve the settlement. Doc. 5600, *id.* Judge Weinstein rejected these suggestions and set and held the fairness hearings in August of 1984, 597 F.Supp. 740, while not completing the claims process until May of 1985, 611 F.Supp. at 1401, Doc. 6046, J.A. 15519; not deciding on the fees until January of

1985, see Jan. 7, 1985 order, JA 11776; and not adopting a distribution plan until May of 1985, 611 F.Supp. 1396.<sup>12</sup> Therefore, the notice of the settlement and *fairness hearings did not* contain any information about the numbers and kinds of claims, the distrubution plan or the fees and none of this information was available during the fairness

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12. Indeed, as Shuck reports, the delay in adopting a distribution plan until *after* the settlement notice and fairness hearings was *intended* to keep the veterans less informed and thus reduce any further alarm among them. "Until the distribution plan was revealed, the settlement would be little more than a pig in a poke." *Schuck* at 172, 173. Shuck, referring to the comments of Special Master Shapiro, further stated: "While it is conceivable that elements of a skeletal plan could be articulated with safety, in this case particularly 'less is more.'" *Id.*

hearings. 597 F.Supp. at 866-876.<sup>13</sup>

Moreover, the court was urged to allow another opt-out period so that the plaintiffs could opt-out of the class settlement after all such information became available and to allow discovery with regard to the settlement negotiations and possible conflicts of interest. Rule 59 Motions, Doc. 4919, 4939, 5121, 5353 and 5476. Judge Weinstein arbitrarily refused these requests. See Trans. Feb. 6, 1985 Hearing, pp. 181-183 and entire record.

7. Approval of the settlement and

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13. Typical of the Veterans' reactions at the fairness hearings, was this comment of one: "Number one, how can the court request class members to decide if the settlement is fair and reasonable when the proposed settlement does not provide those affected with adequate information on which to make an intelligent decision?" 597 F.Supp. at 711.

plan of distribution. Judge Weinstein, in his lengthy opinion approving the settlement, 597 F.Supp. 740, made it clear that, at the least, fact issues existed with respect to the military contractor defense. 597 F.Supp. at 797, 799, 847-851.<sup>14</sup> He in effect conceded that the lump sum amount was grossly inadequate when compared to the numbers and kinds of claims. 597 F. Supp. at 762.<sup>15</sup> He further

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14. At p. 797 of 597 F.Supp., Judge Weinstein stated that the military contractor defense issue "almost certainly would have been ... submitted to a jury."

15. One of the class representatives, Ms Ryan, testified that "now I realize we are in need of a miracle of the loaves and the fishes if we only have 180 million". 597 F.Supp. at 767. Victor Yannacone, who initiated the suit, stated that the settlement was so inadequate that it is "morally unconscionable and has to reflect one of the saddest days of the Trial Bar in personal injury litigation". Doc. 6101, J.A. 16425-16430. The Court of Appeals put it this way: "If even a small number of plaintiffs had gone on to prevail at trial, however, the actual exposure of the chemical companies might well have

admitted that "only a small fraction of one percent of the class" had been heard from at the fairness hearings and it is undisputed that the overwhelming majority of the class is opposed to the settlement.<sup>16</sup> The way Judge Weinstein

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been measured instead in the billions of dollars. Jury verdicts of several million dollars for disabling ailments or injuries to children are not uncommon. If, in the present litigation, each serious claim had a settlement value of \$500,000, the \$180 million would at best cover only 360 plaintiffs. Indeed, the \$180 million is at best only a small multiple of, at worst less than, the fees the chemical companies would have had to pay their lawyers had they continued the litigation. However large a sum \$180 million may be, therefore, we must conclude that in the circumstances it was essentially a settlement at nuisance value." 818 F.2d at 171.

16. Todd Ensign, executive director of Citizen Soldier, estimated under oath that over 90% of the veterans are opposed to the settlement. Doc. 5476, JA 17252, et seq. See also affidavits of Manes and Ellison, local referring attorneys who represent a large number of individual plaintiffs, JA 17256. These estimates were not disputed.

concluded that the settlement was "reasonable", despite the fact it was grossly inadequate on its face, was the clearly erroneous view that plaintiffs could not prove medical causation as to any of 248,000 claims. 597 F.Supp. at 782-795 and see 611 F.Supp. 1223 (opinion on the opt-outs).

The distribution plan adopted by Judge Weinstein demonstrates better than our words ever could the gross inadequacy of the settlement. 611 F.Supp. 1396. Dependent survivors of Vietnam veterans who served their country only to die at home from exposure to Agent Orange will receive a ~~maximum~~ of \$3,400. Totally disabled veterans will receive a ~~maximum~~ of \$12,800. Veterans who are horribly ill but who are not totally disabled within the stringent definition of that term in the Social Security Act and wives who

suffered miscarriages and children with heart-wrenching birth defects as a result of the veterans' exposure to Agent Orange *will all receive nothing*. Most disturbing is that Judge Weinstein completely disregarded the tort concepts which lay at the foundation of the class action and the intent of the AOPMC in agreeing to the tentative settlement, such intent being reflected by the AOPMC's proposed distribution plan (based on cause and effect; discussed 611 F.Supp. at p. 1407-1410 and 813 F.2d at 182, 184).<sup>16A</sup>

Lastly, Judge Weinstein completed the world's greatest judicial finesse; he changed his views and dismissed the Vietnam Veterans' direct case against

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16A. In addition, Judge Weinstein allocated 25 per cent of the settlement fund to a "class assistance foundation" which would be given "broad mandates" to "deal with their (the class') medical and related problems." 611 F.Supp. at 1432.

the Government. 603 F.Supp. 239.  
(Compare with 580 F.Supp. 1242).

8. The rulings of the Court of Appeals. The Court of Appeals - though expressing serious "skepticism over the usefulness of class actions in so-called mass tort cases and, in particular, claims for injuries resulting from toxic exposure", 813 F.2d at 164; rejecting the view that generic causation might be an appropriate issue for a class action trial, 813 F.2d at 164, 165; and concluding that "[w]here this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error", 813 F.2d at 166 - nevertheless affirmed the certification on the erroneous theory that Rule 23(b)(3) "class certification was justified ... due to the centrality of the military contractor defense", id. at

166, and that such defense was "common to all of the plaintiffs' cases", *id.* at 166, 167. Furthermore, with disturbing detachment, the Court of Appeals approved the settlement negotiations and procedures and converted a "nuisance value" settlement into a theoretically "reasonable" settlement by holding that the military contractor defense conclusively barred all Agent Orange claims of the plaintiffs. 813 F.2d at 173, 174, and opt-out opinion 813 F.2d 187.<sup>17</sup>

The Court of Appeals adopted a novel and completely unprecedented approach to that defense by extrapolating medical causation into it and holding that the chemical companies had no duty to impart to the Government knowledge of hazards which were "speculative". 813 F.2d at

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17. The opt-outs are the subject of still another, separate petition for writ of certiorari being filed by Wayne Mansulla. See petition styled *Lombardi v. Dow Chemical Co., et al.*

173, 174. But the absence of causation "as to any claim" in this case is a myth. Not only was it impossible for Judge Weinstein or the Court of Appeals to make any assessment as to the 247,990 claims on which no clinical analysis had been made or discovery engaged in, but the evidence overwhelmingly established fact issues on medical causation with respect to the ten cases going to trial. The multiple markers, clinical studies, relevant biostatistical data, evaluations of existing epidemiological studies,<sup>17A</sup> strong evidence of exposure and the opinion testimony of over 14 world-class experts - including clini-

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17A. A new mortality study just released by the V.A. indicates that a statistically significant higher number of deaths from cancers, including cancer of the lymphatic systems- which one of the representative plaintiffs in this case, David Lambiotte, had - has occurred in Marines who served in Vietnam and were exposed to Agent Orange. See New York Times, September, 1987.

cians, oncologists, epidemiologists, geneticists, urologists, toxicologists, dermatologists, internists and biostatisticians - more than established *prima facie* cases with respect to those ten plaintiffs.<sup>18</sup> For further detail of some of the causation evidence, see Appendix IV. Moreover, a number of fact issues existed with regard to all elements of the military contractor defense. See Appendix III for a further detailing of some of the evidence on the military contractor defense.<sup>18A</sup>

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18. Even Judge Weinstein conceded that: "Yet, despite the lack of general scientific evidence, it cannot be said without hearing the evidence that the plaintiffs could not possibly recover." 597 F.Supp. at 786.

18A. What is further perplexing, is that the Court of Appeals approved the settlement despite the fact that it held that the fee-sharing agreement created a troubling conflict of interest, 813 F.2d 216, and that Judge Weinstein's "class assistance formulations" had to be struck down. 813 F.2d 179.

REASONS FOR GRANTING  
PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT

In this historic case, the district court, and now the Court of Appeals, have presented the world of law with a morally unacceptable legal disposition. They have said that it is their opinion that the Vietnam veterans are legally entitled to nothing out of their suit against the chemical companies but yet it is permissible to extract from those same companies \$180 million for a debt they do not owe. The Vietnam veterans agree with the New York Times - this "Orangemail" should not be legally or morally tolerated. To the credit of the Vietnam veterans, if indeed they are truly entitled to *nothing* out of their lawsuit, they would rather have *nothing* than have the few thousand dollars that

less than five percent of the claimants are going to be "handed-out", with the tragic footnote that the same system which they obeyed when they accepted their draft notices and went off to fight a war nobody wanted or cared about, is now going to close the courthouse door in their face, lock it tight and throw away the key.

All the Vietnam veterans have ever wanted is an adequate settlement or their day in court. The Court of Appeals conceded that the settlement it affirmed was nothing more than one of "nuisance value", 818 F.2d at p. 151, and has justified it as being "reasonable" solely on the ground that the military contractor defense bars as a matter of law all of the claims of the class. This astounding holding was reached through a short shrift analysis of this case that completely ignored the first

two elements of that defense, utilized a new and unprecedented modification of its criteria and made no attempt to analyze the evidence with regard to the issue of comparative knowledge.

In one sweep of the judicial broom, the Vietnam veterans have been reduced to subclass citizens and stripped of their sacred right to a trial by jury, all of this occurring without even a pretense of affording them the minimum protection of Rule 56, F.R.C.P. With all due respect, this judicial catastrophe has to some extent been made possible by an absence of Supreme Court guidance in the areas of law relevant to this unprecedented case. As a result of this, the courts of appeals and district courts have charted their own differing courses into the unknown, with consequential severe conflicts among the circuit courts, confusion,

lack of uniformity and the opportunity for nationally significant cases such as this one to go awry.

This Court has apparently recognized the need to now address questions involving the military contractor defense, by granting writ of certiorari in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4 Cir. 1986), cert granted, 107 S.Ct. 872 and *Shaw v. Aerospace Corp.*, 778 F.2d 736 (11 Cir. 1985), cert. granted, 106 S.Ct. 2243. In view of the prominent role the military contractor defense has played in this case, it is hoped that the Court will at least grant writ of certiorari on that issue and it is our sincere view that the Court would do well, in view of the need for Supreme Court mandates on the other issues and the importance of this case to our nation as a whole, to grant writ of certiorari on all issues herein

discussed.

## II.

Certiorari Should Be Granted To Clarify Whether Cases Such As Agent Orange Are Appropriate For Class Action Disposition.

Quoting the Comment to Rule 23(b) (3),<sup>188</sup> the Court of Appeals, 818 F.2d at 164, properly expressed extreme doubt about the propriety of a class action in a case of this type, citing *In re Northern Dist. of Cal. Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9 Cir. 1982), *cert denied*, 459 U.S. 1171 (1980); *Payton v. Abbott Labs*, 100 F.R.D. 336 (D.Mass. 1983); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D.Tex

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188. The Advisory Committee Note to the 1966 Revision of Rule 23(b)(3) states: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.").

(1974); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78, 83-85 (M.D.Pa.), appeal dismissed, 505 F.2d 729 (3 Cir. 1974). But the Court of Appeals failed to heed its own admonitions and seized upon the military contractor defense as the ultimate solution for the ultimate case. Where the Court of Appeals went astray was in its misperception that the military contractor defense "is governed by federal law"<sup>19</sup> and "is common to all of the plaintiffs' cases." 818 F.2d at 166, 167. The Court of Appeals was patently wrong in assuming that the military contractor defense was common

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19. The holding that federal law applies despite the fact that this is a case where jurisdiction is based on diversity of citizenship, is directly contrary to a number of cases. See *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3 Cir. 1982); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 600 (7 Cir. 1985); *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77 (5 Cir. 1975).

to all plaintiffs or to all defendants. It is undisputed that the knowledge of the chemical companies and the Government progressed between 1961 and 1972 not at an equal pace, so that each plaintiff's vulnerability to the "comparative knowledge" element of the military contractor defense would depend upon his or her time of service and/or exposure in Vietnam. Moreover, the knowledge of each defendant chemical company varied and each had differing amounts of dioxin in its Agent Orange, thus making the need to warn of hazards quantitatively and qualitatively different.

Thus, the tenuous reason for just barely affirming the certification of the class given by the Court of Appeals was wholly untenable. There were, in fact, no predominantly common questions

of fact or law in this case and, therefore, the class action device was not "superior to other available methods for the fair and efficient adjudication of the controversy". The MDL vehicle, combined with the test case approach utilized in the asbestos and benedictine litigation, is by far a superior method procedurally for handling this case and would certainly rectify now, and prevent in the future, the grave injustice of individual judicial rights being nullified by a judge bent on using the class action mechanism as a "means" to accomplish the "end" of judicial expediency.

The holding of the Court of Appeals conflicts with *Dalkon Shield* and the other decisions cited above, thus making certiorari intervention by the Court entirely appropriate. Moreover, as we now discuss, the undisputed facts in this case - relating to the settlement

negotiations, the post-settlement procedures and the fairness of the settlement - provide the sharpest examples of all why the drafters of Rule 23 must have been clairvoyant and so wise when they warned that Rule 23 class actions should generally not be used in mass tort cases.

### III.

Supreme Court Guidance Is Needed To Proscribe Limits Upon The Use Of Judicial Power, To Clarify To What Degree Conflicts Of Interest Will Be Permitted And Lay Down The Other Basic Rules Which Should Guide Class Action Settlement Negotiations.

As the facts about what took place during negotiations, related in the Statement of Case above, make clear, Judge Weinstein violated one of the most salutary principles of class action settlement negotiations. As the court in *Plummer v. Chemical Bank*, 668 F.2d 654 (2 Cir. 1982), stated, "the district judge (in a class action) should not

take it upon himself to modify the terms of the proposed settlement decree, nor should he participate in any bargaining for better terms"; the most a district judge should do is, "with circumspection, 'edge' the parties in what he considers to be the right direction". 656 F.2d at 655, 656.<sup>19A</sup>

The conclusion is inescapable that the decision of the Court of Appeals, in failing to strike down the settlement as being the product of the judge and not the parties, is in fatal conflict with the principles enunciated in

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19A. See also *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1125 (7 Cir.), cert den. 444 U.S. 870 (1979); *Armstrong v. Board of School Directors*, 471 F.Supp. 800, 804 (ED Wis 1979), aff'd 616 F.2d 305, 315 (7 Cir. 1980); and *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5 Cir. 1978) (stating that the role of a judge in class action settlements "is generally limited to mediating disputes and offering suggestions".) See also *In re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088, 1096 (5 Cir. 1977).

*Plummer, In Re General Motors, Pettway and Nissan.* That Judge Weinstein transgressed such principles is perhaps best elucidated by Prof. Schuck:

Given these firm commitments to a settlement almost entirely of his own construction, it was inconceivable that Judge Weinstein would fail to find the agreement "fair, reasonable, and adequate." In effect, he was acting as judge in what had come to be his own case insofar as the settlement was concerned. As to that issue, at least, he was plainly interested in the outcome. For this reason alone, he should have left the Rule 23(e) evaluation of the settlement to another, more detached judge.

Schuck at 178, 179.

The judicial overreaching of Judge Weinstein was compounded by the existence of apparent conflicts of interest, e.g. the fee sharing agreement, see 818 F.2d 216, and by Judge Weinstein's recalcitrant refusal to allow discovery with regard to the negotiating process and the possible conflicts of interest. See *In Re General Motors, supra*, (holding

that failure to permit discovery under circumstances similar to those in this case was an abuse of discretion, 594 F.2d at 1124, 1126); *Girsch v. Jepson*, 521 F.2d 153, 157, 158 (3 Cir. 1975); *Manual for Complex Litigation*, Sec. 146 at 53-54. Moreover, another alarm bell should have been heard by the Court of Appeals by the manner in which private and referring counsel, veteran leaders and class representatives were totally excluded from the negotiations and seven of the class counsel were excluded until the last weekend of the negotiations. See *In re General Motors*, 594 F.2d at 1124-1128. —

Lastly, at the very heart of the impropriety of negotiations in this case was the blatant insufficiency of knowledge about the numbers and kinds of claims. The court in *In re Chicken Anti-trust Litigation*, 669 F.2d 228, 241 (5

Cir. 1982) mandated that "if the record shows unmistakably that the settlement was the product of uneducated guess-work", it should be disapproved "without ever considering whether the agreement is fair."<sup>178</sup> Because of this vacuum of knowledge, the AOPMC was easily misled by inaccurate information about the numbers and kinds of claims. When the other misguided assumptions of the AOPMC - that the class would be given its day in court against the Government; that wives and children would receive direct compensation; and that all funds would be distributed pursuant to traditional

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198. See also *In re Traffic Executive Railroad Assn E. Railroads*, 627 F.2d 631, 633 (2 Cir. 1980) (it is necessary for the judge and the parties "to explore the facts sufficiently to make an intelligent comparison between the amount of the compromise and the probable recovery"); *Plummer*, 668 F.2d at 660 (must know amount of claims so judge will know "what the (class) members are giving up"); and *Malchman v. Davis*, 706 F.2d at 433.

tort principles - are added to the equation, it becomes clear that equitable principles of rescission based upon "mistake" should have been given effect, thus obviating the need to conduct fairness hearings on the settlement.

#### IV.

Another Area That Calls For Enlightenment By The Supreme Court Involves The Post-Settlement Procedures Dealing With The Final Approval Of A Class Action Settlement.

We have in this case a class that should have never been certified and a tentative settlement that should have never been reached. In this situation, the district court should have, at the least, been ever more vigilant in connection with the post-settlement procedures to ensure that the rights of all members of the class were fully protected. We are reminded of one principle that has no peer in class-

action litigation and that is that the district court must act as "guardian" of absentee class members and that "convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class." *In Re General Motors*, 594 F.2d at 1133; *Greenfield v. Villager Industries*, 483 F.2d 824, 832 (3 Cir. 1973); and *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8 Cir.1975).

Because of what has happened in this case, the need to grant certiorari and adopt the following minimum protections of the "individual rights" of class members emerges: (1) that, in cases where a lump sum settlement has been offered in a class action with a large number of claims involving deaths and varying types of serious personal injuries, a pre-notification process must be undertaken, which includes a

preliminary claims analysis to determine the numbers and kinds of claims, the development of a distribution plan and a reasonable effort to estimate the fees and charges against the settlement fund; (2) upon completion of that process, a pre-notification hearing must be conducted in such cases, to determine whether the offer is "within the range" of adequacy and reasonableness, and, if it is, then, and only then, would the court proceed to notice the class of the fairness hearings; (3) the notice of the fairness hearings in such cases must contain an abbreviated but accurate statement of the numbers and kinds of claims, the basic terms of the distribution plan, the estimated fees and charges against the settlement fund and a reasonable explanation of what the settlement really means to those in each category of maladies; and (4) most

important, the notice of the fairness hearings must include an explanation of the options available to the class members and those options must at least include the option of *opting-out of the class and the settlement.*

The court of appeals' decisions which discuss these procedural absolutes are fuzzy, inconsistent and frequently in diametrical conflict. This is all the more reason for this Court to enter the arena. For example, a number of cases indicate that the pre-notification process and hearing is the better part of wisdom - *In Re General Motors*, 594 F.2d 1124-1126; *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7 Cir.1980); and *Manual of Complex Litigation*, Sec. 1.46, at 53-55 (West 1977) - while others pay only lip-service to the suggestion. *In Re Agent Orange*, 818 F.2d at 169, 170, and *City of Detroit v.*

*Grinnell Corp.*, 495 F.2d 448, 462-3 (2 Cir. 1974) ("*Grinnell I*").

The court of appeals' decisions with respect to the contents of the settlement notices are even more disparate and murky. This Court set the proper tone in two decisions, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949) and *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). In *Mullane*, the Court established that notices such as a class-action settlement notice are subject to the due process clause and must be "of such nature as reasonably to convey the required information." 339 U.S. at 314, 315. But what is the "required information"? We respectfully suggest that the lower courts need narrower guidelines. For example, we vainly begged the district court to complete a claims process, promulgate a proposed distribution plan and include

such information, together with the right to opt-out, in the notice of the fairness hearings. This procedure seems supported by the "model case" of *State of W. Va. v. Charles Pfizer & Co.*, 440 F.2d 107 (2 Cir. 1971), cert den. 404 U.S. 871. More explicitly, the court in *Greenfield* stated:

Moreover, the purpose of the notices (settlement notice) was to afford a three-fold opportunity to absentee class members: (1) to file a claim; (2) *to state a desire for exclusion*; or (3) to object to the settlement. *Each of these alternatives is important.*"

483 F.2d at 833; emphasis ours. See also *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1156, 1182 (5 Cir. 1978) and *Ace Heating and Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3 Cir. 1971).

The Court of Appeals ignored the opt-out-of-the-settlement issue, as it did so many others. 818 F.2d at 169, 170. We do not say that information as

to the numbers and kinds of claims, the terms of the distribution plan and the opportunity to opt out of the settlement must be included in the settlement notice in every class action situation. Obviously more flexibility is needed in large, consumer-type class actions where the claims are numerous but small in size and are generally generic. But we do respectfully suggest that the Court should grant certiorari in this case, if for no other reason but to make it clear that, if a district court does enter what should nearly always be forbidden territory - the mass tort class action - the least it should do, consistent with due process and in order to avert the enormous injustices which have occurred in this case, is to ascertain the numbers and kinds of claims, tell the tort claimant how those numbers affect his or her claim within the context of

the distribution plan being adopted and then give each claimant -at that point- the opportunity not only to oppose the settlement but to opt out of a situation which otherwise "gives them no option at all".

## V.

Supreme Court Clarification Is Also Needed With Regard to the Approval of Settlements in Mass Tort Class Actions, Particularly Where the Great Majority of the Class Opposes the Settlement; Where The Amount of the Settlement Is Grossly Inadequate On Its Face and There Is A *Prima Facie* Case As To Liability; And Where The Distribution Plan Constitutes A Unilateral "Alteration" Of The Settlement Reached By the Parties.

A. Class Opposition. The vehement opposition to the settlement by a great majority of the class was not seen as a problem by Judge Weinstein or the Court of Appeals,<sup>20</sup> but their attitude in that

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20. Judge Weinstein, after admitting that he only heard from a fraction of 1% of the class at the fairness hearings, found the "overwhelmingly large silent majority inscrutable." 597 F.Supp. at

regard appears to be contrary to a number of other decisions. *TBK Partners Ltd v. Western Union Corp.*, 675 F.2d 456 (2 Cir.1982); *Pettway*, 576 F.2d 1157, 1216-17 (disapproving settlement opposed by 70% of subclass); *In re General Motors*, 594 F.2d at 1137; *Ace Heating and Plumbing*, *supra*; *Flinn v. FMC Corp.*, 528 F.2d 1169 (7 Cir. 1971); and *Plummer*, *supra*. As the court in *TBK*

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761. As the Court in *In re General Motors* stated: "[W]e are not as willing as GM to infer support from silence.... [I]t (the Court) should be reluctant to rely heavily on the lack of opposition by alleged class members. Such parties typically do not have the time, money or knowledge to safeguard their interests by presenting the evidence or advancing arguments objecting to the settlement. ... Acquiescence to a bad deal is something quite different than affirmative support." 594 F.2d at 1137. See also, *In re Traffic Executive Assn.-E. Railroads*, 627 F.2d at 634 and *Van Gemert v. Racing Co.*, 573 F.2d 733, 736 n.4 (2 Cir. 1978), vacated en banc, 590 F.2d 433 (1978), *aff'd* 444 U.S. 472 (1980).

Partners stated, "(e)specially when a dispute centers on the sufficiency of a settlement fund rather than allocation of a fund, majority opposition to a settlement tends to indicate that the settlement may not be adequate since class members presumably know what is in their own best interests." 674 F.2d at 462; emphasis ours.

B. Gross Inadequacy of the Settlement. The Court of Appeals correctly assessed the settlement as "essentially a payment of nuisance value." 818 F.2d at 151, 171. In such a situation, many courts reject settlements out of hand. *In re Traffic Executive Association*, *supra*; *Seigal v. Merrick*, 590 F.2d 35 (2 Cir. 1978), *aff'ing* 441 F.Supp. 587 (DCNY 1977); *Livman v. J.W. Peterson Coal & Oil Co.*, 73 FRD 531 (DC Ill 1973) and *Sertic v. Cuyahoga, Lake Geauga and*

Ashtabula Counties Carpenters District Council, et al., 459 F.2d 579 (6 Cir. 1972). But the courts below in this case rationalized that, even if the amount of the settlement was "grossly inadequate", it became "reasonable" because the plaintiffs really had no cause of action at all. This conclusion reflects a shocking disregard for the evidence in the record.

Despite the fact that the plaintiffs overcame in the trial court repeated summary judgment motions on the military contactor defense and the defendants, in the face of mountains of evidence, were realistic enough not to even seek summary judgment on causation - the courts below in effect granted side-door summary judgments on those issues when they passed upon the "reasonableness of the settlement", without giving the class members the rights they would have

had under Rule 56. The courts below ignored the imprimatur of Rule 56 that *Grinnell I* placed upon class action settlements:

Whenever ... liability has been *prima facie* established (in a class action), any party wishing to justify a settlement offer that amounted to only a small fraction of the ultimate possible recovery would appear to have a very substantial burden of proof."

495 F.2d at 455. For a more detailed discussion of those issues, we respectfully refer the Court to the Petition for Writ of Certiorari being filed with respect to the opt-outs. *Lombardi v. Dow*. However, we dare not pass on without some appropriate comments.

C. The Military Contractor Defense. Since this Court has already granted certiorari in *Boyle* and *Shaw*, we respectfully request that certiorari be granted in this case - for similar reasons. The need for consideration by

this Court is made apparent by the confusion which now exists in the courts with respect to the criteria being applied to the military contractor defense. Varying and different shades of these formulations can be found in Judge Pratt's holding in 536 F.Supp. at 1056-1058; *McKay v. Rockwell*, 704 F.2d 444 (9 Cir.1983) (adding Governmental immunity requirement); *Brown v. Caterpillar Tractor Co.*, *supra* (defense not available in strict liability cases); *Boyle v. United Technologies*, *supra*; *Tozer v. LTV Corp.*, 792 F.2d 403 (11 Cir. 1986) (mere participation in the preparation of specifications still leaves the contractor immunized); *Tillett v. J. I. Case*, 756 F.2d 591 (7 Cir.1985); *Challoner v. Day & Zimmerman, Inc.*, *supra*; *Merritt v. Guy I. Chapman Co.*, 295 F.2d 14 (9 Cir. 1961) (adding a

"compulsion" requirement); Judge Weinstein's formulations, 597 F.Supp. at 847-851 (dealing with "constructive" knowledge of contractor, "actual" knowledge of the Government and "imputation" of knowledge to the Government); the new theory of the Court of Appeals in this case, 818 F.2d at 190-194 (extrapolating into the comparative knowledge element the issue of "speculative hazards"); and, lastly, the formulation most recently enunciated in *Shaw v. Grunman*, *supra* (adding the requirement that the contractor must advise of known alternative products).

The worst formulation of all is that employed by the Court of Appeals in this case. It sends the message to the chemical companies that: "in any deal with the Government do not test your product; know as little as possible about the potential hazards in your

product; let the hazards remain speculative; that way you can sell the Government all the dangerous products you want to and, even though they kill and injure, you will be immunized from liability." In an era when we are striving to save our planet from chemical inundation, this somehow does not seem to be a position that is correct morally, legally or in the public interest.<sup>21</sup>

In any event, it is truly shocking that the Court of Appeals would not recognize in this case the existence of fact issues as to all elements of the military contractor defense. See *McKay v. Rockwell*, 704 F.2d at 453; *Brown v. Caterpillar Tractor Co.*, 696 F.2d at 256, 257; and *Shaw v. Grumman*, *supra*.

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21. The military contractor defense has been criticized as it has been applied in this case. *The Essence of the Agent Orange Litigation: The Government Contract Defense*, 12 Hofstra Law Rev. 983, et seq.

Agent Orange was bought off the shelf; it was not manufactured in accordance with the specifications approved by the Government;<sup>22</sup> and the chemical companies not only recognized that *the decision-makers* in the Government did not know about the presence of the "contaminant" dioxin in the Agent Orange and the true hazards of that deadly compound but, in 1965, they affirmatively conspired to keep the Government from finding out. See excerpts in App. III. We urge the Court to grant certiorari in this case and, whatever formulation it eventually decides to adopt, make it clear that the rationale so aptly described by Judge Alarcon in his dissent in *McKay* - that a military contractor should be made to

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22. Since the specifications did not mention dioxin, the rule discussed in *Johnston v. United States*, 568 F.Supp. 351 (D.C., Kan. 1983) should control: "... the government contract defense only applies where the injury-causing aspect of the product was mandated by the contract."

stand behind the safety and reliability of "the products for which it voluntarily contracts and provides at a profit", 704 F.2d at 461 - is at the foundation of that formulation.

D. Medical Causation. An unavoidable issue for this Court, we respectfully suggest, is that dealing with medical causation. Judge Weinstein, as Prof. Schuck has disclosed, extended the ripple effect of his medical causation views far beyond the scope of this case by seeking to effectuate a "chill" on all mass toxic tort litigation. *Schuck* at 159, 164. If his views are sanctioned by this Court, medical causation can never be established in cases involving diseases found in the general population without an extensive epidemiological study, the costs of which are generally prohibitive for plaintiffs.

With the future of toxic tort litigation hanging in the balance, the time has come, we sincerely believe, for the Court to decide whether it is going to sanction the hypertechnical, cold and calculating formulae of Judge Weinstein, which demonstrates an almost complete disdain for the Seventh Amendment and the right to trial by jury in toxic tort cases, or the more realistic, particularized and just rule articulated in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C.Cir), cert den., 105 S.Ct. 545 (1984):

Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony."

E. Unilateral Alteration of Settlement. Lastly, *unilateral alterations* of class action settlements, such as those made by Judge Weinstein - in utilizing welfare rather than tort concepts and in disfranchising whole groups and subclasses of plaintiffs - have been seriously condemned. *Pettway*, 576 F.2d at 1172 (district court "cannot

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23. How Judge Weinstein and the Court of Appeals could conclude, in the face of the record in this case, that there can be no causation with respect to any of the 248,000 claimants, is incomprehensible. Epidemiological studies should never be the sole measure of a *prima facie* case on causation in toxic tort cases. Every personal injury case is too individualized to be swept away by that broad and undiscerning brush. The exposure is always different. The genetic make-up is always different. The confounders are always different. The clinical picture is always different. In short, every personal injury case, even where the victims have been exposed to the same chemical compound, is different. In any event, the epidemiological studies involving Agent Orange are subject to differing interpretations. See App. IV.

unilaterally change the settlement decree").<sup>24</sup>

#### CONCLUSION AND PRAYER

In terms of judicial evolution, it is not an exaggeration to say that this case stands at the cross-roads of a number of critical questions and issues. Whatever is decided in this case will obviously have far-reaching and profound effects upon our body of law. The power-

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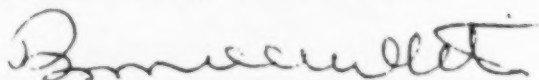
24. See also *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4 Cir. 1975), cert den. 424 U.S. 967 (1976); *In re General Motors*, 594 F.2d at 1133; *Plummer v. Chemical Bank*, 668 F.2d at 655, 656 n.1; *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7 Cir. 1984); *Armstrong v. Board of School Directors*; and *Harris v. Pennsy*, 654 F.Supp. 1042, 1049 (ED Pa 1987) ("The court may either approve or disapprove the settlement; it may not rewrite it."). Nor can the settlement result in the "uncompensated sacrifice of claims of members whether few or many". *TBK Partners Ltd.*, 675 F.2d at 461; *National Super Spud, Inc. v. New York Merchantile Exchange*, 660 F.2d 9, 19 (2 Cir. 1981); *In re Pittsburgh G.L.E.R. Co.*, 543 F.2d 1058 (3 Cir. 1976); and *In re General Motors*, 594 F.2d at 1137.

ful questions of whether this Court will *really* preserve due process in the face of the tremendous class-action momentum that the desire for expediency has generated in recent times; whether the Court will adopt *Ferebee* and make mass toxic tort litigation *really* possible; and whether military contractor defense criteria is formulated by the Court which *really* encourages safety with respect to products used by the military - all desperately need to be resolved. And, in the process of resolving these momentous issues, the anguish of all of us about the Vietnam veteran can be transformed into a brighter place in the conscience of our nation. At the same time, the ground rules can be established for a legal assault upon those actions which could eventually lead to the destruction of

life as we know it.<sup>20</sup>

WHEREFORE, Petitioners pray the Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,



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25. It is appropriate to note the comment of Judge Edwards in *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 636 F.2d 1267 (D.C. Cir.1980) with reference to PCBs (polychlorinated biphenyls) which also generate dioxin with the application of heat: "We feel constrained to add one final note to emphasize our concern in this case. Human beings have finally come to recognize that they must eliminate or control life threatening chemicals, such as PCBs, if the miracle of life is to continue and if earth is to remain a living planet. ... [T]imid souls have good reason to question the prospects for our continued survival, and cynics have just cause to sneer at the effectiveness of governmental regulation." *Id.* at 1286, 1287.

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#### CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari have been this the 12<sup>th</sup> day of October, 1987, placed in the United States Mail, postage prepaid, and appropriately addressed to all adversary counsel of record and one courtesy copy to all others on the district court mailing list has been mailed.

  
Benton Musslewhite